added that I needed this information as I thought it, perhaps, desirable to incorporate this fact in my judgment when describing the narrative of events. Mr Rajasingam then replied that he would need a few hours to seek instructions on the point and when I proposed a meeting at 3.00 pm he said this was acceptable.

Accordingly, when counsel on both sides reconvened at a little past 3.00 pm the same day, I repeated my inquiry and Mr Yeoh's response was this: 'The third defendants took over rights and liabilities of the first defendants with effect from April 1982. The third defendants have been the registered lessees since August 1983.' He added, 'the second and fourth defendants were appointed earth contractors and they remain so up to today. The second defendants were appointed by the first defendants in December 1981. The fourth defendants were appointed in April 1982.'

Mr Mohideen Abdul Kader then interposed to ask, 'who was working on the plaintiffs' plot at the time of the alleged wrongful acts complained about and which occurred on 18 March 1988?' I thought this a most material question since it was these acts which caused the plaintiffs to successfully move the court for the interlocutory injunction. In answer, both Mr Yeoh and Mr Rajasingam confirmed that it was the third and fourth defendants, their servants or agents who were working there then – which, in my view, confirmed the propriety of the interlocutory injunction in the form it now takes.

Order accordingly.

Solicitors: *Meena Rajes & Partners*; *Shearn Delamore & Co*; *Drew & Napier*.

Reported by *Wong Kim Fatt*

Jin Sen Hong (1971) Sdn Bhd v Khiing Sie Khuo (Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd, Intervener)

HIGH COURT (SIBU) – SUIT NO 28 OF 1986
CHONG SIEW FAI J
11 APRIL 1988

Civil Procedure – Judgment debt obtained – Charging order on shares registered in name of judgment debtor made subsequently – Application by intervener to discharge charging order by reason of pledge of shares given by judgment debtor to intervener – Whether pledge is valid – Whether charging order subject to pledge

The plaintiff obtained judgment against the defendant for a certain sum of money. Later, on an ex parte application of the plaintiff, a charging order on some shares in Kion Hoong Organization registered in the name of the defendant was made. The intervener then sought to discharge the charging order or, alternatively, to rank the charging order subject to the rights and interests of the intervener, by reason of a written pledge of the shares made earlier by the defendant in favour of the intervener. The present dispute is therefore between the plaintiff and the intervener as to whether the pledge to the intervener is good and whether the charging order will rank subject to the pledge. For the plaintiff, reliance was placed on art 14 of the articles of association of the Kion Hoong Organization for the contention that the charging order obtained by the plaintiff should prevail over the pledge in favour of the intervener. Article 14 stated that 'the company shall be entitled to treat the registered owner of any share as the absolute owner thereof, and accordingly shall not be bound to recognize any equitable or other claim to or interest in such share on the part of any other persons save as herein provided'. The plaintiff also contended that as the intervener was a wholly-owned subsidiary company of the Kion Hoong Organization, the pledge by the defendant of his shares in the Kion Hoong Organization to the intervener amounted to the company dealing in its own shares indirectly and is in contravention of s 67 of the Companies Act 1965.

Held, allowing the intervener's application: (1) On the evidence, there existed and still exists a pledge of the shares by the defendant to the intervener.

(2) The effect of art 14 is, if Kion Hoong Organization so wishes, to treat the registered holder of any share as the absolute owner and to relieve itself from recognizing equitable interests in such shares. Kion Hoong Organization is not a party to these proceedings and is not asserting any right, claim or relief by virtue of art 14 of its articles of association.

(3) Article 14 does not operate to give the plaintiff a better right over that of the intervener by virtue of the charging order. The charging order is to be subject to the pledge created in favour of the intervener.

(4) The evidence establishes that the defendant trading under the firm of Kion Hoe Importers & Exporters was indebted to the intervener for goods sold and delivered to the defendant and as security for payment of the debt, the defendant pledged the shares to the intervener. There is no question of any of the two companies providing funds or financial assistance for the purposes of, or in connection with, the purchase or subscription of shares in the intervener, company or in its holding company or that any of the two companies in any way purchased, dealt in or lent money on its own shares.

Cases referred to

1 *Harrold* v *Plenty* [1901] 2 Ch 314 (refd)
2 *Simpson* v *Molsons' Bank* [1895] AC 270 (refd)
3 *Cooper* v *Griffin* [1892] 1 QB 740 (refd)
4 *Howard* v *Sadler* [1893] 1 QB 1 (refd)
5 *Max Hilckes* v *Lee Choon Guan* [1912] 1 MC 17 (refd)
6 *Re General Horticultural Company, ex p Whitehouse* (1886) 32 Ch D 512 (refd)
7 *Gill* v *Continental Union Gas Co Ltd* (1872) LR 7 Exch 332 (refd)
8 *Hawks* v *McArthur & Ors* [1951] 1 All ER 22 (refd)
9 *Halliday* v *Holgate* (1868) LR 3 Exch 299 (refd)

Legislation referred to

Companies Act 1965 ss 67, 163(4)
Contracts Act 1950 s 125

Francis Ting for the intervener.
Chan Khoon Ted (George Lim appearing for him) for the plaintiff/judgment creditor.

Cur Adv Vult

Chong Siew Fai J: On 19 August 1986 the plaintiff obtained judgment against the defendant in the sum of $40,145.45 with interest at 8% pa and costs of $350.

On 6 October 1986, on the ex parte application of the plaintiff, an order was made imposing a charge with the payment of the judgment sum on 40,981 ordinary shares in Kion Hoong Organization Sdn Bhd ('the shares') registered in the name of the judgment debtor Khiing Sie Khuo.

On 16 February 1987, on the application of Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd (the intervener), the intervener was allowed to intervene and the intervener, pursuant to order of court, filed a summons dated 8 April 1987 seeking to discharge the charging order made on 6 October 1986 relating to the shares or, alternatively, to rank the charging order subject to the rights and interest of the intervener by reason of a pledge in writing dated 16 January 1986 in favour of the intervener. The dispute, it will be noted, is between the plaintiff/judgment creditor and the intervener.

By consent the issues requiring determination are:

(i) Whether at the date of the charging order, ie 6 October 1986, the intervener had a beneficial interest by way of security in the shares now standing in the name of the defendant?
(ii) In deciding issue (i), the following are to be considered:
    (a) Whether art 14 of the articles of association of Kion Hoong Organization Sdn Bhd gives a better right to the plaintiff's claim over that of the intervener? and
    (b) Whether s 67 of the Companies Act 1965 has been contravened, and if so, what is the effect of the contravention on the intervener's security?

It has also been agreed that depending on the outcome of the determination of the issues above-stated, if the pledge to the intervener is good, the charging order will rank subject to the pledge. But if the pledge is held to be bad, the charging order will stand free of the pledge.

It has further been agreed that in arguing this application, the parties will rely on two affidavits, namely:

(a) Ung Neng Lung's affidavit made on 28 February 1987 and the exhibits annexed thereto filed in support of the intervener's application; and
(b) Kho Kwang Mok's affidavit made on 22 November 1986 filed on behalf of the plaintiff.

In the affidavit of Ung Neng Lung, the evidence, which is uncontradicted, shows that on or about 31 December 1985 the defendant Khiing Sie Khuo trading under the style of Kion Hoe Importers & Exporters was indebted to the intervener in the sum of $103,746.13, that on or about 16 January 1986 the defendant by a letter in writing (exh 'UNL 3' annexed to Ung Neng Lung's said affidavit) pledged, inter alia, the shares to the intervener as security for the payment of the said debt $103,746.13 until such time when he could pay the said debt and redeem the said shares and that the certificates comprising the shares were delivered to and deposited with the intervener. It is also in evidence that the debt remains substantially unsettled and that as at 28 February 1987 the amount outstanding was $101,492.17. In relation to the shares, the intervener therefore claims priority by reason of the pledge over the plaintiff's claim under the charging order made on 6 October 1986.

At the hearing of the application, counsel for the plaintiff cast suspicion over the genuineness of the pledge including raising doubts as to how the share certificates were delivered, pointing out by reference to the defendant's letter that the defendant was in Sibu and the intervener in Kuching. With respect, I am unable to accept such submission which is unsupported by any material challenging the evidence adduced on behalf of the intervener. As rightly pointed out by counsel for the intervener at the hearing, he was in no position to reply to the submission, and the intervener was not afforded an opportunity to answer.

In relation to the pledge, counsel for the plaintiff pointed out that no transfer was executed. With respect, the law, I think, is clear. An equitable mortgage of shares can be created by a deposit of the share certificate relating thereto unaccompanied by a transfer and a valid security may be given on shares by an equitable mortgage. See for example, *Harrold* v *Plenty*.[1] In *Harrold's* case, the defendant deposited with the plaintiff a certificate of shares as security for the repayment of a debt and interest without a transfer. In an action by the plaintiff, Cozens-Hardy J said:

> The deposit of the certificate by way of security for the debt, which is admitted, seems to me to amount to an equitable mortgage, or, in other words, to an agreement to execute a transfer of the shares by way of mortgage.

Doubt was also cast on the genuineness of the pledge by contending that no notice of the pledge was given to the Kion Hoong Organization Sdn Bhd (the Kion Hoong Organization). This is not an agreed issue. Nor had the intervener prior notice that this would be raised. There is also no evidence in the affidavit filed by the plaintiff upon which it could be reasonably expected that such a point would be advanced or upon which the contention would rest. It was the understanding of the parties that the matter would be argued on the basis of the affidavit

evidence as adduced. In the circumstance, it would not only be improper to raise the issue but also unjust to the intervener who would have no opportunity to answer the allegation relating to fact. Besides, counsel for the intervener also quite appropriately drew attention to s 163(4) of the Companies Act 1965 which provides that save as mentioned in that section (which exception does not concern our instant case), no notice of any trust, expressed, implied or constructive, is to be entered on the register or receivable by the registrar. It has been said that the object of the said sub-s (4) is to relieve the company from taking notice of equitable interests in shares (*Simpson* v *Molsons' Bank*[2]) and to preclude persons claiming under equitable titles from converting the company into a trustee for them.

On the evidence, I hold that there existed and still exists a pledge of the shares by the defendant to the intervener.

For the plaintiff, reliance was placed on art 14 of the articles of association of the Kion Hoong Organization for the contention that the charging order obtained by the plaintiff should prevail over the pledge in favour of the intervener. The said art 14 provides:

> The company shall be entitled to treat the registered holder of any share as the absolute owner thereof, and accordingly shall not be bound to recognize any equitable or other claim to, or interest in, such share on the part of any other persons save as herein provided.

The effect of the article is comparable to that of s 163(4) of the Companies Act referred to above. The object is to enable the company to deal with the registered holder of a share as the absolute owner, and to relieve the company altogether from any obligation to take notice of any claims or assertions of equitable interests that may come to it. One example where the article is invoked is where a lien clause in the articles of a company gives rise to question of priority between the company asserting the lien and the persons claiming under the shareholder. So far as concerning our instant case, I fail to see how art 14 can be of assistance to the plaintiff. The company ie the Kion Hoong Organization is not a party to these proceedings and is not asserting any right, claim or relief by virtue of the said art 14. We are here concerned with the competing interests of the plaintiff as a judgment creditor and of the intervener, both of whom are not shareholders respecting the shares in question of the Kion Hoong Organization. I am also unable to accept the plaintiff's contention that art 14 invalidates the pledge. In my opinion, the effect of the article is, if the Kion Hoong Organization so wishes, to treat the registered holder of any share as the absolute owner thereof and to relieve itself from recognizing equitable interests in such shares.

A charging order has no operation except upon shares standing in the name of a debtor in his own right or in the name of some person on trust for him: *Cooper* v *Griffin*,[3] *Howard* v *Sadler*[4] and *Max Hilckes* v *Lee Choon Guan*.[5]

In *Re General Horticultural Company, ex p Whitehouse*,[6] the headnote reads:

> A garnishee order under the Rules of the Supreme Court 1883, O XLV, binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order nisi was obtained and served; consequently it is postponed to a prior equitable assignment of the debt, even in the absence of notice.

Speaking of the judgment creditor who had obtained the garnishee order, Chitty J said (p 516): 'He can only obtain what the judgment debtor could honestly give him.'

In *Gill* v *Continental Union Gas Co Ltd*,[7] the shareholder sold his shares in the defendant company before the plaintiff obtained judgment against the shareholder. But the transfer was registered *after* the plaintiff had obtained the judgment, the charging order nisi, and given notice thereof to the defendant company though *before* the charging order was made absolute. In the plaintiff's action against the defendant company for permitting transfer of the shares, the decision established that it was a good answer to show that the judgment debtor in whose name the shares stood had no beneficial interest in them. Bramwell J said (p 338):

> ... the judgment creditor cannot by his charging order get any more than the debtor could honestly give him.

From the above decisions, it appears clear that a mortgage by way of deposit of certificates of shares with transfer, blank or otherwise, has priority over a charging order that was subsequently made in point of time. The position is the same where a sale of shares contravenes articles restricting transfers. In *Hawks* v *McArthur & Ors*,[8] shares in a private company were sold in disregard of articles restricting transfer and giving pre-emptive rights to all members of the company. The sale took place before the judgment creditor obtained a charging order on the shares. It was held that the purchaser's equitable rights prevailed over those of the judgment creditor.

For the plaintiff, some feeble attempt was made to distinguish the instant case from *Gill* v *Continental Union Gas Co*,[7] in that in *Gill*'s case[7] the element of transfer was present. (For that matter the ingredient is also present in the other cases of *Cooper*,[3] *Max Hilckes*,[5] *Howard*,[4] *Re General Horticultural* [6] and *Hawks*.[8]) I am not impressed by the argument. A pledge has been described as a bailment of personal property as a security for some debt or engagement: 29 *Halsbury's Laws of England* 4th Ed para 389. In *Halliday* v *Holgate*,[9] Willes J in outlining the three types of securities said:

> ... the third, a security intermediate between a lien and a mortgage – viz, a pledge – where by contract a deposit of goods is made a security for a debt, and the right to the

property vests in the pledgee so far as is necessary to secure the debt ... he (pledgor) has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest.

See also s 125 of the Contracts Act 1950.

On the authorities and on the unchallenged evidence relating to the pledge, I hold that the contentions of the plaintiff fail. Article 14 does not operate to give the plaintiff a better right over that of the intervener by virtue of the charging order.

Next, it was contended for the plaintiff that the intervener being a wholly-owned subsidiary company of the Kion Hoong Organization, the pledge by the defendant of his shares in the Kion Hoong Organization to the intervener amounted to the company dealing in its own shares indirectly and is in contravention of s 67 of the Companies Act 1965. No authority was cited in support of the argument.

Section 67 in essence prohibits a company from giving a person financial assistance for the purchase of, or subscription for, its own shares, whether the financial assistance was given 'directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise'. It likewise prohibits such assistance by a subsidiary company to anybody desirous of acquiring, or subscribing for, the shares in its holding company. It also prohibits a company from, in any way, purchasing, dealing in or lending money on its own shares.

In the instant case, there is absolutely no evidence that either the Kion Hoong Organization or the intervener as a subsidiary company had provided financial assistance whether directly or otherwise or in any of the forms, eg loan guarantee or security, nor any evidence of the purpose of or in connection with the purchase or subscription by the defendant or any other person of or for any shares in the Kion Hoong Organization or in the intervener company. Neither is there any evidence suggesting or capable of suggesting that the Kion Hoong Organization or the intervener was in any way purchasing, dealing in or lending money on its own shares. The evidence goes to establish that the defendant trading under the firm of Kion Hoe Importers & Exporters was indebted to the intervener for goods sold and delivered to the defendant and as security for payment of the debt, the defendant pledged the shares to the intervener. There is no question of any of the two companies providing funds or financial assistance for the purpose of, or in connection with, the purchase or subscription of shares in the intervener company or in its holding company or of any of the two companies in any way purchasing, dealing in or lending money on its own shares. In my opinion, this ground of the plaintiff also fails.

In the result, the application of the intervener must, in my opinion, succeed. The parties have agreed that if the pledge ranks in priority, the charging order be made subject to the pledge. In the circumstance, I hold that the pledge created by the defendant in favour of the intervener is valid and that as between the plaintiff and the intervener in this action, the charging order nisi dated 6 October 1986 be made absolute but be ranked subject to the pledge created on 16 January 1986 in favour of the intervener. This means that the claim of the intervener in the shares of the defendant by virtue of the pledge shall rank in priority over that of the plaintiff by virtue of the order to show cause made herein on 6 October 1986 hereby to be made absolute. *Subject as aforesaid*, the interest of the defendant in the shares shall stand charged with the payment of $40,145.45 with interest thereon at 8% pa from 19 August 1986 and costs of $350 due from the defendant to the plaintiff on the judgment herein dated 19 August 1986 together with the costs of the plaintiff's application herein dated 25 September 1986.

Costs of and incidental to this application dated 8 April 1987 be paid by the plaintiff to the intervener. In the absence of an agreement, such costs are to be taxed.

Order accordingly.

Solicitors: *Loke, King & Co*; *Chan & Chan.*

Reported by *Ng Sheau Jiuan*

Lii Tat Credit & Mortgage Sdn Bhd v Tang Liing Kang

HIGH COURT (SIBU) – ORIGINATING SUMMONS NO 83 OF 1986
CHONG SIEW FAI J
31 MARCH 1988

Banking – Chargee's sale of land – Application for – Defences of non est factum, non-receipt of demand notice and moneylending transaction – Merits of case

Moneylenders – Chargee's sale of land – Application for – Defence that plaintiff is unlicensed moneylender – Where burden of proving that party is moneylender lies – Principles applicable – Moneylenders Ordinance (Cap 114), s 8(19)

Contract – Non est factum – Plea of – Burden of proof – Principles applicable

This is an application by the plaintiff under s 148(2)(c) of the Land Code (Cap 81) for sale of the defendant's land charged to the plaintiff to secure repayment of a loan advanced by the plaintiff to the defendant. In opposing the application, the defendant contended that: (a) the memorandum of charge was not explained to him (ie the defence of non est factum); (b) he did not receive the loan or any part thereof; (c) he did not receive or read the notices of demand given by the plaintiff; (d) the interest rate of 12% pa is excessive and unconscionable; and (e) the plaintiff's claim was illegal, void and unenforceable by